IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CIVIL REVISION APPLICATION NO.18 OF 2005

Niwas Spinning Mills Limited — Applicant
vs.
M/s.H.P.Daga & Company — Respondent

Mr.G.S.Godbole for the applicant.

Mr.Vineet B. Naik with Mr.Sameer A. Kumbhakoni for the respondent.

CORAM : B.H. MARLAPALLE,J.

DATED : 17th August 2005

P.C.

Heard Mr.G.S.Godbole, the learned counsel for the petitioner-Mill and Mr.Vineet Naik with Mr.S.Kumbhakoni, the learned counsel for the respondent-company.

2. Rule.

3. Mr.Naik, advocate waives service for the respondent.

4. By consent of the parties, rule is taken up for hearing forthwith.

5. The petitioner-Mill was impleaded as defendant in Special Civil Suit No.149/2001 which has been filed by the present respondent a firm of Chartered Accountants. This suit has been filed for recovery of the

professional fees amounting to about Rs.61,01,478/- with future interest at the rate of 18% per annum. The defendant-Mill filed its written statement and opposed the claim and by taking into consideration the pleadings of the respective parties issues were framed below Exhibit 29 on 15th January 2002 by the trial Court and there was no issue regarding limitation or maintainability of the suit on account of the provisions of Regulation no.192 of the Code of Ethics framed by the Institute of Chartered Accountants of India. The defendant filed an application at Exhibit 38 and contended that the suit was required to be rejected on preliminary points viz. (a) the suit was filed beyond the period of limitation and (b) Regulation No.192 of the Code of Ethics restricted charging of fees and, therefore, it would not be permissible to charge the professional fees on the basis of percentage of amount sanctioned to the defendant by the banks or the financial institutions. Thereafter an application at Exhibit 43 was submitted on or about 9th July 2002 praying for framing of preliminary issues as under:

(i) Whether the plaint is liable to be rejected in view of the provisions of the Chartered Accountants Act, 1949?

(ii) Whether the plaint is liable to be rejected as the

claim of the plaintiff is barred by law of limitation?

. The plaintiff submitted its say at Exhibit 46 on 18th July 2002 to the application at Exhibit 38 and by the impugned order dated 18th November 2004 the said application at Exhibit 38 has been rejected by the learned IInd Adhoc Additional District Judge at Solapur.

6. On the point of limitation Mr.Godbole, the learned counsel for the defendant referred to the decision of this Court (Division Bench) in the case of Meher Singh v. Deepak Sawhny & anr., **1998 (3) Mh.L.J. 940** and submitted that the issue of limitation being a mixed question of fact and law, the same could not have been decided without providing an opportunity to the parties concerned to lead evidence. Admittedly, the defendant did not file an application before the trial Court for leading evidence. Nevertheless the reasoning given by the trial Court in paragraph 4 of the impugned order does indicate that the issue of limitation could have been efficaciously decided by calling upon the parties to lead evidence on the documents referred to therein. Mr.Vineet Naik, the learned counsel for the plaintiff, therefore, fairly conceded that the issue of limitation being a mixed question of fact and law, could be considered along with all other issues while deciding the main suit and after the parties lead evidence.

7. So far as the reliance on Regulation No.192 of the Code of Ethics is concerned, it is pointed out that the order passed by the Council of the Institute of Chartered Accountants of India (Exh.72) has been challenged by the present petitioner by filing a writ petition before this Court. The said Regulation reads as under:

> "192. **Restriction in fees**:
>
> . No Chartered Accountant in practice shall charge or offer to charge, accept or offer to accept, in respect of any professional work, fees which are based on a percentage of profits or which are contingent upon the following or results of such work:
>
> Provided that:-
>
> (i) In the case of a receiver or a liquidator, the fees may be based on a percentage of the realization or disbursement or of the assets.
>
> (ii) In the case of an auditor of a co-operative society, the fees may be based on a percentage of the paid-up capital or the working capital or the gross or net income or profits; and
>
> (iii) In the case of valuer for the purposes of direct taxes ad duties, the fees may be based on a percentage of the value of the property valued.

8. A plain reading of Regulation No.192 does not by any stretch of imagination lead to a conclusion that even if it is made applicable in the instant case the

plaint is required to be returned under Order 7 Rule 11 of Code of Civil Procedure. The said Regulation puts a restriction on charging the fees and it states that the professional fees should not be on the basis of percentage of profits or it cannot be charged on the basis of the results. If the said Regulation is made applicable in the instant case, there may be, at the most, reduction in the professional fees and, therefore, the plaintiff cannot be non-suited by relying upon the said Regulation, notwithstanding the fact that the challenge to the order at Exhibit 72 is raised in the writ petition pending before this Court.

9. In the result, this revision application succeeds partly. The impugned order is quashed and set aside to the extent of the issue of limitation and it is directed that the said issue shall be an additional issue at Exhibit 29 and it shall be decided along with all other issues while deciding the main Suit after parties lead the evidence. Rule is made absolute accordingly, but without any order as to costs. Trial of the suit is expedited.

(B.H. MARLAPALLE,J.)